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NONPOPULATION FACTORS RELEVANT TO AN ACCEPTABLE STANDARD OF APPORTIONMENT

*Jerold Israel**

Of the many problems left unanswered in *Baker v. Carr*,[1] the one that has received the most attention both from lower courts and commentators is that of prescribing a specific standard for determining what constitutes a denial of "equal protection" in legislative apportionment.[2] The starting point universally accepted — indeed, probably required by *Baker* — for attacking this problem is the definition of apportionment equality in terms of mathematical measurement of the individual's "voting power."[3] Perfect equality in apportionment is viewed as requiring that each election district contain an equal population, so that every individual's vote in his district will represent the same fraction of the total possible votes which could be cast in any other district. Only a handful of states come very close to this concept of per capita equality of voting power, however,[4] even though population is a significant factor in the apportionment of all 50 state legislatures.[5]

On the eve of *Baker v. Carr*, there were in most states one or more constitutional or statutory prescriptions governing apportionment which prevented population equality within legislative districts.[6] For example, eight states had provisions requiring equal representation in one legislative branch for certain local governmental units (usually counties).[7] Several states had adopted modi-

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1 369 U.S. 186 (1962).

2 Exactly to what degree this was left unanswered in *Baker* is a matter of some dispute. *Compare* Israel, *On Charting a Course Through the Mathematical Quagmire: The Future of Baker v. Carr*, 61 MICH. L. REV. 107, 108-13 (1962), *with* Neal, *Baker v. Carr: Politics in Search of Law*, 1962 SUPREME COURT REVIEW 252, 261-67.

3 Mann v. Davis, 213 F. Supp. 577, 581 (E.D. Va. 1962), *prob. juris. noted*, 31 U.S.L. WEEK 3404 (U.S. June 10, 1963) (No. 797). This is a measurement, of course, only of "theoretical" voting power, and not of the actual significance of an individual's vote in terms of the outcome of a particular election. For a criticism of the use of such a measurement as a basis for determining voting equality, see DE GRAZIA, APPORTIONMENT AND REPRESENTATIVE GOVERNMENT 57-59 (1963).

4 See David & Eisenberg, DEVALUATION OF THE URBAN AND SUBURBAN VOTE 1-4 (1961); Goldberg, *The Statistics of Malapportionment*, 72 YALE L.J. 90, 100-01 (1962).

5 Delaware is the only state in which no reference to population is made in the statutory or constitutional authority governing apportionment in either house. Legislative districts in both houses are fixed by a constitutional provision, but the districts were originally framed in the light of the population distribution. See Sincock v. Duffy, 215 F. Supp. 169, 173-74 (D. Del. 1963).

6 The ensuing compilations of state apportionment provisions are based on the description of state law prior to *Baker* contained in NATIONAL MUNICIPAL LEAGUE, COMPENDIUM ON LEGISLATIVE APPORTIONMENT (1962 Supp.); THE BOOK OF THE STATES 58-62 (1962); and materials prepared by my colleague William Pierce as part of a book on legislative apportionment to be published by The American Enterprise Institute. There is, of course, always some difficulty in classifying statutes in one category or another, and these compilations therefore are intended only to give a general picture of the over-all distribution of nonpopulation apportionment provisions among the states. For a post-*Baker* summary, see the chart contained in Dixon, *Apportionment Standards and Judicial Power*, 38 NOTRE DAME LAWYER 367 (1963).

7 Arizona, Idaho, Montana, Nevada, New Jersey, New Mexico, South Carolina, and Vermont (towns). Other state constitutions specifically designate certain geographical areas as legislative districts. See, *e.g.*, Arkansas, North Dakota, Oklahoma (all upper houses).

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fications of this plan, such as the Georgia "county unit" system, which vary the representation of each unit to a relatively minor degree according to its population.[8] Still other states achieved a similar result by prohibiting the inclusion of more than two or three counties in one legislative district.[9] Twenty-six states had requirements guaranteeing minimal representation for either every city, county, or group of counties, irrespective of their population.[10] Working from the opposite side, 10 states had provisions limiting the number of representatives which may be allocated to either any city, county, or group of counties, irrespective of large populations which would otherwise entitle these areas to many more representatives.[11] Finally, most states, including several without any of the foregoing restrictions, prohibited multiple-county legislative districts which encompassed only a portion of one of the counties.[12]

These state apportionment requirements, obviously based upon factors other than population, create significant disparities in the population size of legislative districts, and thereby preclude per capita equality of voting power. The crucial question which the Supreme Court must face when it reaches the apportionment cases next term is how many, if any, of these nonpopulation provisions will survive the application of the fourteenth amendment. Yet, as is true of so many problems in this area, there is no single, clearly correct answer to that question. The Court could, with some justification in each instance, accept either all, a few, or only one of these restrictions. In the end, what nonpopulation factors are considered constitutionally acceptable will depend upon how the Court answers a single question: What mode of legislative representation is required by the concept of a "representative government" (or, phrased differently, an "indirect democracy").[13] That question is, I believe, inextricably a part of the application of the equal protection clause to legislative apportionment, and its answer necessarily controls in large part, though not exclusively, the meaning of the clause in this area.

The equal protection clause, it must be remembered, does not guarantee equal treatment for all; it precludes only that discrimination which lacks a "ra-

8 Connecticut, Florida, Georgia. See also Maine and Maryland.

9 *E.g.*, California.

10 Alabama, Arkansas, Connecticut, Hawaii, Idaho, Iowa, Kansas, Louisiana, Maine, Mississippi, Missouri, Montana, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, Utah, Vermont, West Virginia, Wyoming. These provisions relate primarily to the lower houses of the state legislatures.

11 California, Florida, Iowa, Maine, New York, Oklahoma, Pennsylvania, Rhode Island, Texas. See also New Hampshire (limitation only upon unconsolidated towns).

12 See Thomas, *Legislative Apportionment*, in THE PROPOSED MICHIGAN CONSTITUTION 32 (Inter-University Faculty Committee, Ann Arbor 1963); SHULL, LEGISLATIVE APPORTIONMENT IN MICHIGAN 43 (Citizens Research Council, Detroit 1961). Such provisions are frequently found in the state statutes rather than the state constitutions.

13 Representative government is here referred to only in the sense of its traditional employment in this country, as an aspect of government based upon popular self-rule. See MILL, REPRESENTATIVE GOVERNMENT (1861). Our representative form of government has from the very start been tied to the principle of popular sovereignty. See Deitze, THE FEDERALIST 122-23, 151-57 (1961). Thus, Hamilton spoke of this form of government as a "representative democracy." *Id.* at 152. n.58. Madison and others of his day who used the more common term "republic," were also referring to what we today call a "representative" or "indirect" democracy. See DAHL, A PREFACE TO DEMOCRATIC THEORY 10 (1956). *But cf.* HOOK POLITICAL POWER AND PERSONAL FREEDOM 19-24 (1959).

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tional basis" for its differences in classification.[14] While the content of "rationality" necessarily varies with the subject matter, the Supreme Court has offered a general, three-step analysis of this term, which was aptly described by Justice Brandeis as follows:

> [First] the classification must rest upon a difference which is real . . . so that all actually situated similarly will be treated alike; . . . [Second] the object of the classification must be the accomplishment of a purpose or the promotion of a policy, which is within the permissible functions of the State; and [Third] . . . the difference must bear a relation to the object of the legislation which is substantial, as distinguished from one which is speculative, remote or negligible.[15]

Certainly the distinction in individual representation resulting from the application of the typical nonpopulation apportionment provisions rests upon "real differences" in the population groups involved — the economic, demographic and other differences between people living in different geographic areas, usually between rural and urban areas. The key question therefore must be whether these differences have any "substantial" relationship to the legitimate governmental objectives to be achieved by apportionment. This, of course, only raises still another question: What are the permissible functions of apportionment? And the answer to that question must depend, in turn, upon what is considered to be the proper function of a legislature in a representative government, for it is that function which apportionment is designed to implement. In other words, one must first decide whom the legislature in a representative government may represent — whether, for instance, it is limited to representing individual persons according to their numbers (*i.e.*, the majority), or may also represent various interest groups or factions in the populace, irrespective of their numbers.[16] Only after this has been decided can you determine if a particular nonpopulation requirement has a real relationship to the legitimate function of apportionment, and therefore serves as a "rational" basis for classification.[17] For example, granting equal representation to all political subdivisions imposes "invidious discrimination" if the legislature's sole function is to represent individ-

14 See McGowan v. Maryland, 366 U.S. 420, 425-26 (1961); Allied Stores, Inc. v. Bowers, 358 U.S. 522, 527-28 (1959); Morey v. Doud, 354 U.S. 457, 463-64 (1957).

15 Quaker City Cab Co. v. Pennsylvania, 277 U.S. 389, 406 (1928) (dissenting opinion). As to the relationship of this analysis to due process, see Israel, *supra* note 2, at 133 n.110.

16 *Cf.* Justice Frankfurter, dissenting in *Baker*, 369 U.S. at 300:

> One cannot speak of "debasement" or "dilution" of the value of a vote until there is first defined a standard of reference as to what a vote should be worth. What is actually asked of the Court in this case is to choose among competing bases of representation — ultimately, really, among competing theories of political philosophy . . . .

17 *But see* Dixon, *Legislative Apportionment and the Federal Constitution*, 27 LAW & CONTEMP. PROB. 329, 383 (1962), forcefully presenting the argument that

> without reaching Justice Frankfurter's question of the "theoretic base of representation in an acceptably republican state," the Court could hold, on an appropriate factual base, that a representation system under which a major group of complainants is excluded from effective voice in either house is unreasonable because minority process is not due process.

I suggest, however, that Professor Dixon's conclusion that some degree of majority control is constitutionally required necessarily rests upon certain assumptions as to the theoretic base of representation — specifically, that the legislature is designed in some degree to represent the individual voters, or at least that portion of voters who make up the majority.

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uals on a per person basis, but it is an entirely reasonable ground for classification if the legislature may represent the special "group interests" of each local community irrespective of its population. The final conclusion as to rationality thus depends upon what is accepted initially as the permissible bases of representation for a "representative" government.

Having indicated the importance of this initial query as to the nature of representation, I would like now to suggest four different approaches the Court might take in answering that question, and to examine the consequences of each approach in terms of the nonpopulation apportionment provisions which it would sustain.

I

Under the first approach, the Court would refuse entirely to consider the question of what constitutes a permissible basis for legislative representation in a "representative" government. To do so, the Court might note, would be inconsistent with a long line of its decisions[18] refusing to interpret that clause of the Constitution which guarantees to the states a "republican" form of government.[19] Any judicial evaluation of the proper nature of legislative representation in a representative government must necessarily involve substantial consideration, and hence interpretation, of this leading constitutional provision which attempts to prescribe the form of state government.[20] Yet the Court has consistently refused to interpret that provision on the ground that the concept of a "republican" form of government fails to contain within it judicially discoverable, and manageable, standards.[21] In fact, many of the cases involving the guarantee clause presented essentially the same basic question which is raised here under the equal protection clause — to what degree must the majority control the government?[22] Certainly any attempt to answer this question in terms of the proper basis of legislative representation would tend to under-

18 This line begins with Luther v. Borden, 48 U.S. (7 How.) 1 (1849). See the Court's discussion in Baker v. Carr of *Luther* and cases following it, 369 U.S. at 218-24.

19 "The United States shall guarantee to every State in this Union a Republican Form of Government . . . ." U.S. CONST. art. IV, § 4. "The guaranty [also] necessarily implies a duty on the part of the States themselves to provide such a government." Minor v. Happersett, 88 U.S. (21 Wall.) 162, 175 (1874).

20 In fact, the Court's interpretation of the requirement of a "republican form of government" would probably control completely its determination as to the proper bases for legislative representation. See Israel, *supra* note 2, at 135-36, Emerson, *Malapportionment and Judicial Power,* 72 YALE L.J. 64, 71-72 (1962). This would be particularly true if the Court adopted the broad view of republican government which is suggested in the Federalist Papers. See THE FEDERALIST No. 10 (Madison) No. 14, at 83-84 (Cooke ed. 1961) (Madison), No. 48, at 333-34 (Cooke ed. 1961) (Madison). See DAHL, *op. cit. supra* note 13, at 4-33.

21 Baker v. Carr, 369 U.S. at 223. It may be argued that the Court's reliance upon the political question doctrine in these cases was really based upon a desire to avoid conflict with the power of decision vested in the political branches of government, rather than upon the absence of standards. See 369 U.S. 222 n.48; Bonfield, *Baker v. Carr: New Light on the Constitutional Guarantee of Republican Government,* 50 CALIF. L. REV. 245, 246-52 (1962); *cf.* Emerson, *supra* note 20 at 68. If that were the case, then the guarantee clause decisions should present no bar, either direct or indirect, to claims against *state* legislative apportionment. It seems unlikely, however, that all of the Court's guarantee clause decisions can be limited to this ground. See Coleman v. Miller, 307 U.S. 433, 454-56 (1939).

22 See, *e.g.,* Luther v. Borden, 48 U.S. (7 How.) 1 (1849); Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912). For a discussion of the manner in which these cases presented that question, see Israel, *supra* note 2, at 136 n.125. See also COMMAGER, MAJORITY RULE AND MINORITY RIGHTS 20-21 (1943).

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mine this long line of decisions (which were accepted by the majority in *Baker*)[23] and, in so doing, would raise the ghost of many issues long thought to be dead. For once the Court can determine whether legislative representation must be founded upon a particular concept of representative government, then must it not be open to consider the basis of other governmental institutions in the light of that concept? Is it consistent with the concept of representative government for the judiciary to be appointed, for an elected official to hold office more than X number of years, for a referendum to override legislation approved by the legislature, etc.? These questions, it must be remembered, can be raised in terms of the equal protection clause as well as the guarantee clause.[24]

Of course, if the Court adopted this line of reasoning, it would have to accept as a "rational" means of classification all nonpopulation apportionment provisions which are logically related to any possible view of a proper basis for legislative representation in our form of government. This would include all of the common nonpopulation restrictions which I described previously, since, as will be seen later, they all are reasonably related to the concept of legislative representation of "group interests." In fact, the Court under this approach might even be required to sustain some new apportionment restrictions, such as representation of occupational groups,[25] which could cause far greater disparity in per capita representation than presently exists. Such general acceptance of nonpopulation apportionment does not, however, justify criticism of this approach as one which renders *Baker v. Carr* meaningless; the analysis suggested here would not, as some have contended, merely have the effect of replacing the Brennan majority opinion with the Frankfurter dissent.

The application of the equal protection clause in the apportionment context does not depend entirely upon the adoption of a theory as to the proper nature of representative government. Equal protection still requires that distinctions in treatment be capable of explanation in terms of some principle, even though the Court might refuse to judge the rationality of that principle as it relates to any particular view of the requisite basis of legislative representation. This, I gather, was what the majority opinion in *Baker* was referring to when, in reply to the alleged lack of "judicially manageable standards" for judging apportionments, Justice Brennan stated that it had always been the Court's function under the fourteenth amendment to determine whether a "discrimina-

23 369 U.S. at 226-29. It has been suggested that this line of reasoning is "spurious" because the Court in the apportionment area may avoid the pitfall of the lack of a judicially meet standard which has precluded decision in other guarantee clause cases. Comment, *Baker v. Carr and Legislative Apportionments: A Problem of Standards,* 72 YALE L.J. 968, 988-89 (1963). However, the author makes no attempt to show how the basic question for which the Court must devise a standard in the apportionment cases is any different from that presented in the previous guarantee clause cases. See Bonfield, *supra* note 21 at 250-52, 254-57.

24 *Cf.* Pacific States Tel. and Tel. Co. v. Oregon, 223 U.S. 118 (1912). Other questions along the same lines are suggested by the "check list" of election requirements in DE GRAZIA, *op. cit. supra* note 3, at 13-16.

25 *Cf.* DE GRAZIA, *op. cit. supra* note 3, at 23, 169-71. See also *Id.* at 48, raising the possibility of allocating representation according to wealth (more representation for the poor because they need more governmental services), intelligence, or known performance in civic affairs.

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tion reflects *no* policy, but simply arbitrary and capricious action."[26] Apparently, it also was what Justice Clark was looking for when he rejected the Tennessee apportionment on the ground that it was a "crazy quilt" (although the rationale which led him to this test was obviously quite different from that suggested here).[27] Whether unacceptable state apportionment schemes are characterized as being "crazy quilts," "hodge-podges," "loco," or "without rhyme or reason,"[28] the basic thesis is the same — classification in apportionment must have behind it some identifiable and intelligible principle applied with some consistency. Inequality of representation in legislative districts must relate to some difference between the districts which serves as the basis for the state pattern of classification. If, for example, a state bases its apportionment on a combination of population plus certain nonpopulation devices designed to favor rural areas over urban areas, it should not be allowed to grant different representation to two areas which, in terms of population and the rural-urban distinction, are essentially identical.[29]

Of course, the foregoing should not be taken as a suggestion that a state apportionment can only be based upon one or two clearly designated factors. Equal protection does not forbid complexities, nor does it require that the bases for allocating representation be formally announced.[30] The burden is upon the one attacking the apportionment to show that it contains basic inequities no matter what factors were assumed to have been applied.[31] Moreover, it should

26 369 U.S. at 226.

27 369 U.S. at 254 (concurring opinion). Justice Clark, of course, first considered on the merits the problem of whether nonpopulation factors constituted a constitutionally permissible basis for legislative representation. After finding that they did, he went on to consider whether the legislative apportionment in Tennessee could be explained in terms of the application of any such factors. *Id.* at 251-52, 254-56, 258.

28 See, *e.g.*, 369 U.S. at 254, 257 (Clark, J., concurring); Brief for the United States as Amicus Curiae on Reargument, p. 28, Baker v. Carr.

29 For the application in other contexts of this same requirement that there be a significant difference between geographical areas which are treated differently, see Lucas, *Legislative Apportionment and Representative Government: The Meaning of Baker v. Carr,* 61 MICH. L. REV. 711, 775 & nn.257 & 258 (1963). This type of discrimination is sometimes characterized as "horizontal discrimination." 369 U.S. at 256 (Clark, J., concurring).

30 See Nashville, C. & St. L. Ry. v. Browning, 310 U.S. 362 (1940); Snowden v. Hughes, 321 U.S. 1, 11 (1944). See also note 36 *infra.*

31 Baker v. Carr, 369 U.S. 186, 266 (1962) (Justice Stewart's opinion). See the cases cited note 14 *supra. Cf.* Dixon, *Apportionment Standards and Judicial Power,* 38 NOTRE DAME LAWYER 367 (1963). *But see* McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection,* 61 MICH. L. REV. 645 (1963). Professor McKay argues very ably that the presumption of constitutionality should be "reversed" in the apportionment cases because the "right of franchise" is one of the "basic civil rights of man." *Id.* at 666-77. However, while the Court frequently has acknowledged a distinction in the application of the presumption between cases involving "the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and these cases in which it is applied for its own sake" (*i.e.*, to economic regulation), West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 639-40; United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938), it has never specifically recognized any distinction under the equal protection clause between regulation of economic "rights" and some general category of "basic civil rights." Admittedly, as Professor McKay emphasizes, the presumption has to a large degree been reversed in cases concerning racial discrimination (see Bolling v. Sharpe, 347 U.S. 497, 499 (1954); Oyama v. California, 332 U.S. 633, 646 (1948)), but those cases may involve economic rights as well as "personal" or "civil rights." *E.g.*, Oyama v. California, *supra;* Shelley v. Kraemer, 334 U.S. 1 (1948). The crucial factor in this area was the basis for the discrimination rather than the particular interest destroyed by that discrimination. *Compare* Cassel v. Texas, 339 U.S. 282 (1950) (exclusion of Negroes from jury service), *with* Hoyt v. Florida, 368 U.S. 57 (1961) (restrictions on jury service by females). Insofar as distinctions based upon race are concerned, the history of the fourteenth amendment

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be stressed that the inequities must constitute something more than minor discrepancies. Equal protection does not require a mathematical formula mathematically applied. The apportionment need show no more than a fairly even-handed application of some identifiable general principles which relate to actual differences between legislative districts.[32]

The suggestion has been made, however, that even this is too much to expect from a state. Apportionment, so the argument goes, is traditionally the product of complex political battles, involving numerous compromises, which cannot be reconstructed in terms of "principled explanations."[33] Even assuming that this is true of most apportionment today,[34] I fail to see why it should alter a standard otherwise clearly applicable.[35] Judges, administrative boards, and even most arbitrators are ordinarily required to spell out the basis for their decisions. So, for that matter, are legislators in the sense that their legislation traditionally must meet the same standard of equal protection which now would be applicable to apportionment.[36] The fact that a subject involves

itself establishes a clear standard which precludes any reliance upon a presumption of constitutionality. See Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 72 (1873); Strauder v. West Virginia, 100 U.S. 303 (1880). Analyzed in this light, the racial cases certainly would not seem to support any general principle of reversing the presumption of constitutionality in equal protection cases involving that general group of interests which might be classified as "basic civil rights."

A much stronger precedent for such a principle would be Skinner v. Oklahoma *ex rel.* Williamson 316 U.S. 535 (1942), which is also relied upon by Professor McKay. The court there struck down a statute providing for the sterilization of "habitual criminals," including larcenists but excepting embezzlers. In the course of his majority opinion, Justice Douglas emphasized that a "basic civil right" was involved and "strict scrutiny of the [state's] classification is essential . . . ." *Id.* at 541. It has been suggested, however, that the *Skinner* case should have been decided on due process rather than equal protection grounds. See 316 U.S. at 543-45 (concurring opinion of Chief Justice Stone). The same suggestion has been made with respect to Griffin v. Illinois, 351 U.S. 12 (1956), another of the cases cited in support of reversing the presumption of constitutionality, especially since the plurality opinion in *Griffin* discussed both the equal protection and due process clauses. See Allen, *Griffin v. Illinois: Antecedents and Aftermath,* 25 U. CHI. L. REV. 151 (1957). Allen, *The Supreme Court and State Criminal Justice,* 4 WAYNE L. REV. 191, 199 (1957). But, in any event, the *Griffin* opinion, unlike that in *Skinner,* contained no discussion as to what the Court considered the proper approach in judging the rationality of the classification made by the Illinois statute.

Finally, it should be noted that in *Baker* at least three Justices specifically found the presumption to be applicable. See 369 U.S. at 266 (Stewart, J., concurring), at 334-35 (Harlan, J., dissenting). Although some lower courts have shifted the burden in apportionment cases, they have done so only after making an initial determination on the merits that population was constitutionally required to be the primary factor in an apportionment scheme. See, *e.g.,* Lisco v. McNichols, 208 F. Supp. 471, 477-78 (1962); see Neal *supra* note 2, at 289 (criticizing such reversal of the presumption).

Of course, as a practical matter, the burden on the one attacking the apportionment will require only that he show the inapplicability of the typical bases of representation. *Cf.* Justice Clark's concurring opinion in Baker, 369 U.S. at 251.

32 *Cf.* McGowan v. Maryland, 366 U.S. 420, 524 (1961) (opinion of Frankfurter, J.); Railway Express Agency v. New York 336 U.S. 106 (1949).

33 See generally Neal, *supra* note 2, at 289-90; Dixon, *supra* note 31.

34 *But see* DE GRAZIA, *op. cit. supra* note 3, at 40-46, for an example of how even a most complex apportionment scheme (New York's) can be explained in terms of a mixture of various theoretic bases of legislative representation. Consider also text accompanying notes 93-95 *infra.*

35 See note 26 *supra.*

36 Of course, this explanation of legislation in terms of "rational principles" as required by the fourteenth amendment is actually the task of the state's attorney in court, rather than that of the legislators in the legislative chambers. Nevertheless, the constitutional requirement of rationality often affects the manner in which the legislators discuss legislation, if not their voting on it.

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politics does not mean that it should be devoid of principle. Insofar as political compromise in apportionment may be rationalized in terms of demographic differences between geographic areas, it should be constitutionally acceptable.[37] But insofar as apportionment is solely the product of the "you let us keep X in office, and we'll let you keep Y in office" type of compromise, it must be rejected. There is no greater reason for sustaining an apportionment scheme which only can be explained in terms of such a compromise than there is to sustain a special exemption from a regulatory status which only could be justified on the ground that its beneficiaries are constituents of representative X and he needs the votes. On the contrary, by requiring that apportionment be explainable in terms of intelligible principles, the application of the equal protection clause may raise the level of legislative decision in this area to that which we hope for in all legislative determinations.

In this regard, one may note that apparently there are many state legislative apportionments which could not meet even this limited standard of equal protection. This is primarily true of those states where the legislature has permitted the passage of time and the accompanying shifts in population to set the apportionment scheme. Such has often been the case in states like Tennessee where the original apportionment was based primarily upon population, but the legislature failed to reapportion at regular intervals.[38] Since population movements scarcely will follow a consistently rational pattern, the natural result is that after 20 years or so the state has an apportionment scheme which can readily be characterized as a "crazy quilt." The same situation is also likely to arise in the few states which have "frozen" legislative districts,[39] even though these districts are often based on nonpopulation factors. Shifts in population may alter the application of these other factors, since rural areas may become urban and vice versa. It should be emphasized that in both of these situations the inequalities in apportionment are a product of legislative inaction rather than legislative action. A court probably is less likely to rely heavily on the presumption of constitutionality in this circumstance. The basis for apportionment, if any, is not articulated in a statute or legislative reports,[40] and there is truly an "air of unreality" in attributing some unarticulated, rational appor-

37 Of course, the requirement here is only that the legislation be capable of explanation in terms of rational principles, not that the individual legislator actually was motivated by such principles. If a state of facts "reasonably may be conceived" which justify the statutory discrimination, the court will assume that the legislature acted on those facts. See McGowan v. Maryland, 336 U.S. 420, 426 (1961). This does not mean, however, that an unconstitutional legislative purpose will be ignored where it is obvious. See Israel, *supra* note 2, at 140 n.138 and cases cited therein.

38 See 369 U.S. at 191. Prior to *Baker*, 27 states had not reapportioned for a quarter-century, although most of them had at least one house which was required to be apportioned on a population basis. Lewis, *Decision on Reapportionment Points up Urban-Rural Struggle*, N. Y. Times, April 1, 1962, § 4, p. 3, col. 2. See also Lewis, *Legislative Apportionment and the Federal Courts*, 71 HARV. L. REV. 1057, 1060 (1958).

39 *E.g.*, Arkansas, Delaware, Michigan (under the 1908 constitution as amended in 1952).

40 Of course, even where there is legislative action there frequently will not be any published legislative reports. Yet where these reports are available, they often provide a fairly clear picture of the objectives which guided the legislature or constitutional convention in devising the present apportionment scheme. See, *e.g.*, the statements from the New York Constitutional Convention of 1894 quoted in Silva, *Legislative Representation — With Special Reference to New York*, 27 LAW & CONTEMP. PROB. 408, 410-11 (1962).

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tionment design to the series of legislatures which have been inactive over the years.[41]

Finally, one further comment should be made before leaving this first approach to the application of the equal protection clause and the problem of determining the permissible bases of legislative representation in a "representative government." Even under this approach, not every apportionment scheme founded on a consistent pattern will be constitutionally acceptable. The apportionment must be based upon factors that are not inconsistent with those legitimate objectives of government which we accept no matter what view is taken of the proper mode of representation. For example, an apportionment scheme based upon race would not be acceptable since it is contrary to the specific language of the fifteenth amendment as well as to the history of the fourteenth amendment which generally makes distinctions based upon color arbitrary per se.[42] Similarly, a legislature certainly could not apportion a state so that each of the legislator's homes would constitute a separate election district and the rest of the state would constitute an additional district. Discrimination justified solely in terms of legislators' self-interest cannot be accepted as consistent with a legitimate objective of government, irrespective of whether one views representative government as permitting legislative representation of individuals as such, of political units, or of demographic and geographic interest groups.[43]

II

A second approach which the Court might adopt would be to consider directly the question of the proper bases for representation in a state legislature; to find that legislative representation of various interest groups, even when disproportionate to the group's size, is consistent with the objectives of representative government; and therefore to sustain all of the usual nonpopulation apportionment provisions on the ground that they bear a reasonable relationship to this function of representing various group interests.

The concept of interest group representation, which lies at the heart of this approach, is based upon the premise that our society is composed not merely of isolated individuals, but of various "separatist groupings" of people with different "communities of interest."[44] Representation of these various in-

41 Neal, *supra* note 2, at 269. See also *id.* at 283; Israel *supra* note 2, at 139-40; Lucas, *supra* note 29, at 746.

42 See Gomillion v. Lightfoot, 364 U.S. 339 (1960); *id.* at 349 (Whittaker, J., concurring); cases cited note 32 *supra*. See also Baker v. Carr, 369 U.S. 186, 285-86 (dissenting opinion); Dixon, *supra* note 18, at 366.

43 *Cf.* 369 U.S. at 300, 337-38 (dissenting opinions).

44 DE GRAZIA, *op. cit. supra* note 3, at 19, 23, 167-68. See generally TRUMAN, THE GOVERNMENTAL PROCESS 14-26, 33-39 (1955); THE FEDERALIST No. 10 (Madison).

The theory of group representation is, of course, framed within the limitations inherent in defining group interests. It does not envisage the direct representation of a specific membership of a sharply defined segment of society. Communities of interest do not remain stable. People who have certain general interests in common will not always be in agreement. There are groups within groups, particularly within regional factions, and every person will belong to more than one such group. See CUBER & KENKEL, SOCIAL STRATIFICATION IN THE UNITED STATES 227-48, 292-96 (1954); DAHL, *op. cit. supra* note 13, at 115. Thus, "representation of group interests" generally refers to little more than the reflection of the general sectionalist interests of a particular regional or geographic faction of the state's population. *But cf.* DAHL *supra* at 112-18 (criticizing senate apportionment as means of representing minority groups).

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terest groups is thought necessary to insure that legislatures be responsive to their "heterogenous total constituencies" rather than just those factions which constitute the majority.[45] Nonpopulation apportionment generally is designed to provide such representation, especially of geographic factions, to an extent often strikingly disproportionate to the group's size. In this manner, it promotes total legislative responsiveness by granting those segments of the population which are commonly in the minority some political security against the majority. At the present, the primary beneficiary of this policy is that geographical faction composed of people who live in the more remote and sparsely settled areas of the states, *i.e.*, the rural population.[46]

Most of the typical nonpopulation provisions governing state apportionment can be explained in terms of this function of representing and protecting minority regional group interests, although some serve it in more obvious ways than others. Probably the most direct implementation of this policy is found in apportionment provisions which are framed in terms of the particular interest group to be represented. For example, New Hampshire has a requirement tying its senatorial apportionment to the amount of direct taxes paid by the property owners.[47] The requirement of equal representation for each city might also be placed in this same general category since each city itself creates a local interest group based on the common problems its citizens face as residents of the same community.[48] Another typical state apportionment provision easily related to the policy of protecting minority factions is that prescribing the maximum number of representatives which can be allocated to heavily populated areas.[49]

The requirements of equal representation, or a specified minimum representation, for each county are slightly more difficult to justify in terms of fostering representation of the various minor segments of society. The county, unlike the city, is probably too widespread to constitute a local community interest group in and of itself. Nevertheless, the provisions guaranteeing it equal or mimimum representation often indirectly result in the representation and pro-

45 BICKEL, THE LEAST DANGEROUS BRANCH 192 (1962). See also BUCHANAN & TULLOCK, THE CALCULUS OF CONSENT — LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY 213-22, 233-48 (1962).

46 This, of course, is only a very general description of the type of minority interest group which is favored by the use of nonpopulation factors in apportionment. Characterization of such groups solely in terms of an urban-rural distinction produces a strikingly oversimplified picture of the various communities of interest within a total population. *Cf.* Krastin, *The Implementation of Representative Government in a Democracy,* 48 IOWA L.R. 549, 561-63 (1963). For the arguments pro and con granting additional representation to rural areas, *compare* DE GRAZIA *op. cit. supra* note 3, at 43-47 (greater diversity of interests; not as easily organized politically; more difficult to represent sparsely settled areas), *with* TWENTIETH CENTURY FUND, ONE MAN-ONE VOTE 6-9 (Conference pamphlet 1962) (city populace is just as difficult to represent, and involves no greater threat of bloc voting; Constitution provides other means for protecting minorities). See also Emerson, *supra* note 20, 72-73; Silva, *supra* note 40, at 409-12.

47 The apportionment scheme thus is aimed at giving greater representation to the wealthier property owners. In practice, however, it closely parallels the population distribution. See Levitt v. Maynard 104 N.H. 243, 182 A.2d 897 (1962).

48 *Cf.* Lucas, *supra* note 29, at 766-67.

49 Consider also the "moiety" provisions which grant representation to counties which have only a fraction (usually ½) of the population required for representation under an "equal populations" standard. See BAKER, STATE CONSTITUTIONS: REAPPORTIONMENT 7-8 (1960).

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tection of minority interests. Ordinarily, their application produces many election districts much smaller in population, and a few much larger, than would be obtained under an "equal populations" standard. Since the smaller districts permit the election of representatives by groups too small to obtain a legislative voice under a population standard, the end result will be an increase in the diverse interests and viewpoints represented in the legislature. Further, the mix of the smaller and the larger districts will usually produce much more substantial representation for the larger minority faction, like the rural farmer, than equally populated districts would have produced. Consequently, while one might agree with those who criticize the allocation of representation in terms of counties as a rather poor method of implementing regional group interest representation,[50] it still must be recognized as having a sufficiently substantial relationship to that goal to meet the equal protection standard of rationality.

Thus, all of the typical nonpopulation requirements probably can be rationalized in one fashion or another as logical standards for apportionment, *provided* that one accepts the concept of a legislature designed (a) to represent the different viewpoints of the various regional groupings in the society, and (b) to give minority groupings special political security through disproportionate representation which will prevent them from being overridden by a bare majority of the populace. The difficult problem lies in sustaining this proviso. On what grounds, one may ask, can the Court accept this view of representative government which is so inconsistent with the thesis of majority control?

My initial suggestion in this regard is that the Court might rely upon the history of apportionment in this country as related in Justice Frankfurter's opinion in *Baker v. Carr*.[51] This history clearly shows that legislative apportionment in the United States has from its very start been based upon nonpopulation provisions which gave special representation to minority interests.[52] The counterargument has been made, however, that such history is no longer relevant because our basic view of the political equality of individuals has altered considerably in the period since the Civil War when we adopted the fifteenth, seventeenth, and nineteenth amendments. Although the majority opinion in *Gray v. Sanders*[53] did not profess to deal with legislative apportionment, its language certainly seems to present substantial support for this counterargument.[54] I suspect, therefore, that if the Court approves the concept of legislative

50 *Cf.* Sindler, *Baker v. Carr: How to "Sear the Conscience" of Legislators*, 72 YALE L.J. 23, 29 (1962); *cf.* DAHL, *op. cit. supra* note 13, at 112-18. The inadequacy of county representation in this respect is partially explained by the fact that it originally was predicated in large part on the assumption that at least roughly similar numbers of people would be equally represented. See Krastin, *supra* note 46, at 553.

51 369 U.S. at 301-24 (dissenting opinion). See also Scholle v. Hare, 360 Mich. 1, 85, 91-109, 104 N.W.2d 63, 107, 111-17 (1960) *reversed on remand from the United States Supreme Court*, 367 Mich. 176, 116 N.W.2d 350 (1962); Dixon, *supra* note 17, at 385, 386.

52 *Cf.* McCloskey, *The Supreme Court 1961 Term, Foreword: The Reapportionment Case*, 76 HARV. L.R. 54, 71 (1962); Krastin, *supra* note 46, at 552.

53 372 U.S. 368 (1963).

54 See particularly 372 U.S. at 376-77 n.8 where the Court cites the fifteenth, seventeenth and nineteenth amendments to illustrate that the Hamiltonian "conception of political equality" (as expressed in *The Federalist No. 68* supporting the electoral college) "belongs to a bygone day and should not be considered in determining what the Equal Protection Clause of the Fourteenth Amendment requires in statewide elections." Consider "One Person, One Vote," N.Y. Times, editorial, March 20, 1963.

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representation of interest groups disproportionate to their population, it will probably rely more upon the presence of fundamental policies in our governmental structure which are consistent with that concept than upon the direct historical precedents.

One such policy may be found in the very process of apportioning a state into districts from which legislators are chosen (as opposed to their election on an at-large basis). A major objective of this practice of districting is to foster representation of regional viewpoints, to represent groups who would be in the minority in an at-large election, but have enough votes in a single district to elect its representative.[55] Our election districts are not designed so that they will mirror the over-all composition of the state population; on the contrary, they are designed on the assumption that people living in the same area have certain local (and often general) interests in common which frequently will be quite different from those of people living in other parts of the state.[56] Thus, our uncontroverted acceptance of apportionment as a proper governmental device necessarily includes within it an acceptance of the concept of legislative representation of a state's various geographical factions. The question still remains, however, whether this policy underlying apportionment extends so far as to justify granting these regional interest groups representation disproportionate to their percentage of the total population. Strong arguments can be made that it does — that the acceptance of districting necessarily amounts to a rejection of proportionate representation.[57]

First, the apportionment goal of representing the whole variety of regional group interests necessarily conflicts with proportionate representation, which would limit legislative representation to only these factions large enough to merit it on a population basis. Yet, this goal of widespread representation of interests appears to be a much more fundamental aspect of districting than is the use of a population standard. Districting by its very nature undermines the majoritarian principle which serves as the primary philosophical foundation for the population standard.[58] With districting, the number of voters who support a particular party will often be less significant than the degree to which the voters are concentrated within a particular area.[59] For example, in a jurisdiction with a population of 100,000 divided equally into 25 legislative districts of 4,000, a political party would need no more than 26,013 properly placed votes —

55 See DE GRAZIA, APPORTIONMENT AND REPRESENTATIVE GOVERNMENT 19-20 (1963); Lucas, *supra* note 29, at 766-67; Neal, *Baker v. Carr: Politics in Search of Law*, 1962 SUPREME COURT REVIEW 277.

56 On the factual justification for this assumption, see CUBER & KENKEL, *op. cit. supra* note 44, at 288-92. *But see* Krastin, *supra* note 46, at 561, who notes the lack of any "thorough and systematic examination" of the proposition that "policy choices . . . are approached differently by aggregates of persons depending on the situs and density of their residences."

57 *But cf.* Tyler, *What is Representative Government?*, New Republic, July 16, 1962, p. 15.

58 See Krastin, *supra* note 46, at 560; DEGRAZIA, *supra* note 55, at 35-36; Tyler, *supra* note 57. Of course, the one-man-one-vote standard rests upon the principles of equalitarianism as well as majoritarianism, and while the two are generally thought of as interwoven aspects of a single political theory (see DAHL, *op. cit. supra* note 13, at 37; Sabine, *Two Democratic Traditions*, 61 PHILOSOPHICAL REV. 451 (1952)), they probably are capable of separation to some degree.

59 See Sindler, *supra* note 50, at 24-25, pointing to so-called "party strength malapportionment" which has occurred as a result of the "natural forces" of districting and uneven distribution of party strength in a state apportioned strictly on the basis of population.

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2,001 votes in each of 13 districts — to elect a majority of the legislators. Districting thus reduces the 51 per cent minimum required for control to something close to 26 per cent control, but obtains in return far more diversity of the group interests represented than the at-large election which would preserve majority control.[60] Certainly, one might well assume that this goal of widespread representation, achieved at the cost of subordinating the principle of majority rule,[61] logically must also prevail over the principle of per capita equality of representation.[62]

Second, the generally accepted operation of districting also might be relied upon to show that disproportionate representation of group interests is a normal attribute of the policy underlying apportionment. Thus, to restrict a substantial interest group to its proportionate share of the total is contrary to the normal flexibility of apportionment even when a strict "equal populations" standard is applied. Assume, for example, a legislative body with 10 seats, and a minority faction with 11 per cent of the state's population concentrated in a single area. Although its proportionate share of the state's population might entitle this group to elect only one representative, the practical operation of districting may just as well permit it to elect two representatives, depending upon where lines are drawn in framing the legislative districts; the state may, without violating any provisions prohibiting gerrymandering,[63] divide the area in which the minority faction is concentrated, so that the group constitutes over 50 per cent of the population in each of two districts. The significance of this largely uncontrollable factor of placing district boundaries[64] might well convince the Court that acceptance of the policy underlying apportionment necessarily precludes any insistence upon proportionate representation.

Finally, even if the concept of representing group interests should be viewed as limited by a requirement of representation proportionate to population, the apportionment could not properly be based upon an "equal populations" standard. For under that standard, a minority group might well be composed of 10 per cent of the state's population, yet be unable to elect any of the state's ten representatives because no more than four-tenths of the total

60 A system of proportional representation based upon free population alignments might serve both goals, but would present serious problems of its own. See HERMENS, DEMOCRACY OR ANARCHY? — A STUDY OF PROPORTIONAL REPRESENTATION (1941).

61 I use the term "subordinating" rather than "eliminating" because the concept of majority rule does not hinge solely upon the percentage of persons who control the legislative election. It must be remembered that every legislator supposedly represents all of the people in his district, not just those who voted him into office. Even in the case hypothesized above, where 26% of the populace controls the election of the legislative majority, the 13 legislators needed to pass any legislation still represent districts containing over 50% of the state's population.

62 But see note 58 *supra*.

63 Ordinarily state law requires only that districts be compact and contiguous. See DE GRAZIA, *op. cit. supra* note 55, at 3, 27, 66-67. Of course, even such districts may be gerrymandered, in the sense of favoring the political party which controls the apportionment agency. See Neal, *supra* note 55, at 278 n.75 (quoting a New York Times editorial on New York's congressional districts). *But cf.* Thomas *supra* note 12, at 33 (limiting gerrymandering to irregularly shaped districts). The division of a regional interest group in districting need not, however, be a product of such gerrymandering. For example, it might result from state laws requiring districts to follow town or county lines. See text accompanying notes 87-88 *infra*.

64 *Cf.* text accompanying notes 87-88 *infra*.

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group, *i.e.*, 4 per cent of the population is concentrated within a single district. To insure such a group its proportionate representation, the state would have to depart from a population standard and create a smaller district in which the concentrated four-tenths would represent a majority. (This rather ironic result only lends further support for the previously advanced argument that the policy of regional group representation reflected in apportionment necessarily requires the subordination of the population factor in order to achieve the more important goal of representing a greater variety of group interests.)

Aside from districting, there are numerous other instances in which we have adopted policies that lend support to the principle of providing special representation for minority groups. For example, many states require extraordinary majorities (usually two-thirds) for the adoption of certain types of legislation, such as the approval of a new bond issue by the electorate or the initiation of a constitutional amendment by the legislature.[65] In these instances, it is thought best to leave matters as they are until substantially more than a bare 51 per cent majority can be obtained in support of new action. But if a state can reasonably demand that some legislative action be based on a broader consensus than a bare majority, why could it not insist upon a broader consensus for all legislative action? Might not a state constitutionally impose a requirement that all legislation be approved by legislators representing two-thirds of the populace? If so, then why not achieve the same minority security by allocating approximately one-half of the legislative seats to regional minority groups which represent one-third of the population? Of course, minority protection in this manner has certain characteristics not found in the two-thirds requirement. Under the apportionment scheme, the minority's veto is placed in the hands of the same regional groups on a permanent basis. Also, the significant representation granted these groups may permit them, with some outside help, to pass legislation which is generally opposed by the true majority.[66] While these differences are undoubtedly significant, they still do not entirely undermine the basic force of this analogy.

It should be noted that a somewhat similar analogy was accepted by Justice Clark in *Baker*[67] when he relied upon *MacDougall v. Greene*.[68] There the Court had held that Illinois could reasonably require a "diffusion of political initiative as between its thinly populated counties and those having concentrated masses"[69]

65 See Neal, *supra* note 55 at 252. Over half of the states require extraordinary majorities on constitutional amendments. See THE BOOK OF THE STATES 13-14 (1962); Shull, *Political and Partisan Implications of State Legislative Apportionment*, 17 LAW & CONTEMP. PROB. 416, 423-25 (1962) (listing other legislative action requiring more than a simple majority).

66 The argument often made in justification for special political protection of minority groups is that a higher degree of consensus is needed in our no longer homogeneous society than would be provided under a requirement of simple majority rule. See Lucas, *supra* note 29, at 772. But by converting the minority group into something close to a legislative majority, nonpopulation apportionment may result in an even lower consensus of agreement. It cannot be viewed, as some have suggested, simply as a device for permitting the minority "to deflect the action of the 'majority'." See Neal, *supra* note 55, at 280; *cf.* BICKEL, *op. cit. supra* note 45, at 193. Yet, on the other hand, the possibility of complete minority control may be very remote in practice, depending upon the alignment of the various overrepresented minority groups and other factors. See Neal, *supra* at 281.

67 369 U.S. at 251-52.

68 335 U.S. 281 (1948).

69 335 U.S. at 284.

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in the nomination of candidates for office by a new political party. Justice Clark apparently reasoned that the basic policy of the Illinois statute could logically be extended to insure a similar diffusion of support in the passage of legislation, through apportionment based on nonpopulation factors.[70] The same type of "logical extension" of policy might be argued with respect to common provisions in various other areas which give minority interests the power to deflect the majority will.[71]

Once the Court accepts the concept of disproportionate representation of various minority factions, it then must consider the extent of the legislative power which may be thus granted minority groups. Most commentators and courts have suggested that the equal protection clause imposes strict limits upon the amount of "extra" representation which may be allocated to regional group interests through the use of nonpopulation apportionment. Some commonly advanced limits are that population be the sole basis for apportionment in at least one legislative branch;[72] that population be considered to some extent in apportioning both branches;[73] and that districts representing a majority of the population elect at least 40 per cent of the representatives in either house.[74] One wonders, however, how the Court can draw lines here any more than it can say that the highest percentage of voter approval which a state might require on a new bond issue is 60 per cent or 70 per cent.[75] Perhaps some point may be reached where the major regional interest groups have so little representation that the Court might say they have, for all practical purposes, been denied a real part in the process of balancing and bargaining which produces legislation.[76] But except in this rare instance, I suggest that a court which takes the

70 This reasoning has been criticized on the basis of the distinction between imposing "a condition of initial access to the ballot" upon a new political party (*MacDougall*) and the "disproportionate weighting of the votes of qualified voters in *every* primary and general election" (*Baker*). McKay, *supra* note 31, at 680. On Justice Clark's behalf, however, one must note that the analogy between the *MacDougall* situation and legislative apportionment was first drawn by a majority of the Court in *MacDougall* itself. The per curiam opinion in that case cited the legislative apportionment in the United States Senate as support for its decision upholding the constitutionality of the Illinois statute. 335 U.S. at 283-84.

71 See Neal, *supra* note 55, at 281 (drawing analogies to the filibuster and the seniority system for choosing committee chairmen). The protection of minority regional interests is also served by home rule, which withdraws subjects from the state-wide arena, where regional interests may be in the minority, and places them in the local arena. *Cf.* Lucas, *supra* note 29, at 770-71. In this same category might be placed the "local option" provisions found in various statutes, such as those concerning Sunday closing hours.

72 See, *e.g.*, Toombs v. Fortson, 205 F. Supp. 248 (N.D. Ga. 1962).

73 See, *e.g.*, Sims v. Frink, 208 F. Supp. 431 (M.D. Ala. 1962), *prob. juris. noted sub nom.* Reynolds v. Sims, 31 U.S.L. WEEK 3404 (U.S. June 10, 1963) No. 508).

74 See Goldberg, *The Statistics of Malapportionment*, 72 YALE L.J. 90-91, 95, 97-99 (1962). *Cf.* W.M.C.A., Inc. v. Simon 208 F. Supp. 368 (S.D.N.Y. 1962), *prob. juris. noted*, 31 U.S.L. WEEK 3404 (U.S. June 10, 1963) (No. 460).

75 The inability of a court to establish meaningful limits upon nonpopulation apportionment is well illustrated by the discussion in Comment, 72 YALE L.J. 968, 1002-30 (1963), which attempts to judge apportionment in terms of the total governmental responsiveness to those geographical factions (generally urbanites) which have had their voting power diluted by the employment of the nonpopulation factors.

76 Consider in this light note 66 *supra*. *But see* note 75 *supra*. *Cf.* Lucas *Legislative Apportionment and Representative Government: The Meaning of Baker v. Carr*, 61 MICH. L. REV. 711, 776 (1963). As Professor Lucas notes, "a difference in representation might at some point [become so extreme as to] be looked upon as a disfranchisement in disguise," which would be judged by "standards of exclusion" rather than standards of apportionment. See also Colegrove v. Green, 328 U.S. 549, 571-72 (dissenting opinion).

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view of representation here under discussion logically must accept the use of nonpopulation factors even as a major element in apportionment.

Of course, there always remains the requirement that the apportionment scheme be explainable in terms of identifiable principles. This aspect of the equal protection standard should be applicable no matter what view is taken of the proper bases of representation. Thus, the rationale which I have here described as the "second approach" — under which the Court accepts the concept of group interest representation — produces, in effect, the same practical result as the first approach — under which the Court would refuse to consider what bases of representation were permissible in a representative government.

III

A third approach would be considerably more restrictive than either of the first two. Relying on reasoning similar to that employed in *Gray v. Sanders,*[77] the Court might reject the general use of nonpopulation factors in the apportionment on the ground that special representation of interest groups was inconsistent with our concept of a representative government; it might find that the legislative representation of individuals must be based on a principle of one man-one vote, *i.e.,* per capita equality of voting power. At the same time, however, the Court might also conclude that representation need not be solely of individuals, but that local governmental units might also be granted representation. Although this conclusion would appear to be inconsistent with the one man-one vote principle, at least two interesting lines of reasoning can be advanced in support of its compatibility with that concept.

Under the first rationale, emphasis would be placed upon the substantial autonomy of the local governments (including any state constitutional guarantees of home rule),[78] and on the significant role these governments play as the primary unit of community operations.[79] These factors, the Court might argue, justify granting representation in one legislative branch to local governmental units as separate entities, while the individual's interest in representative government is preserved through per capita equality of representation in both the local government council and the other state legislative branch. This position would necessarily require consideration of the so-called "federal analogy," (including the concept of the state as a federation of local units) which Professor McKay has already discussed.[80]

77 372 U.S. 368 (1963). The majority opinion in Gray v. Sanders is explicitly limited to state-wide elections as opposed to legislative districting, see 372 U.S. at 376, 378, and the two problems can be distinguished. See Dixon, *Legislative Apportionment and the Federal Constitution,* 27 LAW & CONTEMP. PROB. 329, 382 (1962). Nevertheless, the manner in which the opinion was written, particularly the language in the last few paragraphs, 372 U.S. at 380-81, suggests that *Gray* may be a stepping-stone to the adoption of the one man-one vote principle in apportionment, just as Gomillion v. Lightfoot, 364 U.S. 339 (1960) (which also explicitly distinguished the apportionment problem) was the stepping-stone to Baker v. Carr. See the N.Y. Times editorial cited *supra* note 54.

78 See LITTLEFIELD, METROPOLITAN AREA PROBLEMS AND MUNICIPAL HOME RULE 13 (Mich. Legal Pub. 1962).

79 See DE GRAZIA, *op. cit. supra* note 55, at 41. Of course, this is much more applicable to municipalities than counties.

80 See McKay, *The Federal Analogy and State Apportionment Standards,* 38 NOTRE DAME LAWYER 487 (1963); MCKAY, REAPPORTIONMENT AND THE FEDERAL ANALOGY 1-10 (1962).

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A second rationale would stress the absence, rather than the presence, of autonomy in local government. Accordingly, this line of reasoning would be limited in applicability to states without widespread home rule.[81] In such states, a large portion of the bills passed by the legislature are "special acts" which relate specifically to the operation of a particular local government.[82] Moreover, even the "general acts" often are framed in such a manner that they are applicable to only one or two local units. Under these circumstances, it is argued, every local government must be given legislative representation in order to defend its own interests. It might even be claimed that the local governments are in reality the true constituency of the state legislature since they are the specific subjects of its legislation. If this rationale were accepted, the Court certainly would approve provisions guaranteeing minimal representation to each governmental unit,[83] and perhaps also would accept provisions requiring equal representation for each unit — although such a requirement could possibly be rejected as giving more representation than needed to insure adequate presentation of a local government's interests in the special bills.[84]

IV

Under still another view of the requirements of representative government, the Court might reject any type of legislative representation other than the representation of individuals on a one man-one vote basis.[85] Of course, under this approach the general use of nonpopulation factors in apportionment would be barred. Yet, even here a few specific nonpopulation requirements might be accepted even though they detract from the ideal of per capita equality of representation.

For example, most states have requirements that county boundaries be followed in apportioning districts which contain more than one county.[86] In other words, while an "equal populations" standard might suggest that a legislative district be composed of county X plus a portion of county Y, the county-boundary provision requires that the district contain either both X and Y intact or just X alone. The county can only be divided when it contains more than one district, and then state law often requires that city and township lines be followed.[87] The county-boundary requirement obviously is inconsistent with a strict application of the one man-one vote principle. It often

81 "Home rule has not been accepted by most states." LITTLEFIELD, *op. cit. supra* note 78, at 13.

82 See *e.g.*, Sobel v. Adams, 208 F. Supp. 316, 321-322 (S.D.Fla. 1962) (1266 special acts relating to counties and municipalities passed in Florida in 1961).

83 See *id.* at 322.

84 A line drawn at this point would seem rather arbitrary, however. There is little difference between a provision guaranteeing equal representation and one guaranteeing minimal representation in a state where the number of counties almost equals the total number of legislative seats. In Iowa, for example, each county is guaranteed one seat, but there are 99 counties and only 108 seats. It has been suggested that minimal representation of each unit not be allowed under these circumstances, McKay, *supra* note 31, at 698-99, but this would necessarily defeat the basic objective of local government representation.

85 Here again, the primary reliance might be placed upon the rationale of Gray v. Sanders, see note 78 *supra*. The arguments in support of this result are well stated in the Twentieth Century Fund pamphlet, ONE MAN-ONE VOTE (1962).

86 See note 11 *supra*.

87 See SHULL, *op. cit. supra* note 12, at 43.

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necessitates legislative districts which have two or three times greater population than other districts.[88] On the other hand, the provision tends to impose a significant curb upon the legislature's power to gerrymander. It also serves the cause of administrative convenience since the governmental election machinery ordinarily is built around the local government unit.[89] When these very legitimate interests are weighed against the resulting degree of disparity in the population of certain districts, I suspect that most courts will accept county-boundary requirements even under a one man-one vote principle.[90]

A deviation from equal population per legislative district might also be permitted in particular instances on the ground that a smaller district is necessary as a practical matter in order to provide effective representation of the district's inhabitants. Where great portions of a state are very sparsely settled, a district based upon an "equal populations" standard might include such a large area as to make the district representative practically inaccessible to his constituents and vice versa. This would be particularly true of areas which still are to a large degree undeveloped, with few highways, little television, and no papers with mass distribution. In such an instance, the Court might well accept a state's determination that a smaller district is necessary, even though it would create a departure from the one man-one vote principle.[91] This is not to suggest, however, that every nonpopulation factor which might serve to limit the area of election districts will be accepted on this ground. Certainly the Court would require that the nonpopulation aspect of apportionment be aimed directly at preventing unwieldy districts, and that it be used only by a state where such districts might exist.[92]

One example of the type of provision which might be sustained on this ground is found in the new Michigan Constitution.[93] The state senate is apportioned under a formula which takes into consideration both population and area. Each county is assigned so-called "apportionment factors" on the basis of four factors for each per cent of the state's population and one factor for each per cent of the state's land area. The counties are then combined or divided so that each senate district has approximately the same number of "apportionment factors."[94] Thus, for the state as a whole, the apportionment is based 80 per cent on population and 20 per cent on area; within any one district,

88 See THOMAS, *supra* note 12, at 32 (Michigan county line requirement responsible for range of 2.1-1 between largest and smallest districts in lower house); NATIONAL MUNICIPAL LEAGUE, COMPENDIUM ON LEGISLATIVE APPORTIONMENT 2 (1960) (disparities in California assembly districts ranging up to 3.2-1 caused "in large measure" by the county boundary requirement).

89 See THOMAS, *supra* note 12, at 33; SHULL, *supra* note 12, at 43.

90 *But cf.* Scholle v. Hare, 367 Mich. 176, 116 N.W.2d 350 (1962). The opinion of Mr. Justice Kavanagh at first seems to accept this requirement, but then suggests a maximum population disparity ratio of 2 to 1 which may bar its operation. *Id.* at 188-90, 116 N.W.2d at 355-56; see note 92 *supra*. *Compare* Israel, *On Charting a Course Through the Mathematical Quagmire: The Future of Baker v. Carr*, 61 MICH. L. REV. 107, 119 & n.52, *with* Comment 72 YALE L.J. 968, 1003-04 n.167 (1963).

91 See Sincock v. Duffy, 215 F. Supp. 169, 187 (D. Del. 1963).

92 See Sincock v. Duffy, *supra* note 91, rejecting the attempt to justify nonpopulation apportionment on this ground in the state of Delaware.

93 Art. IV, § 2. The new constitution will not go into effect until Jan. 1, 1964.

94 Counties with 13 or more factors are assigned seats first. The remaining counties are then combined in districts containing as nearly as possible 13 factors, but in any event no less than 10 nor more than 16.

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however, the number of factors allocated to it on the basis of area may be far greater or less than 20 per cent of its total factors. The primary beneficiary of the area criteria is the Upper Peninsula, where more "apportionment factors" are allocated on land area than on population.[95] The new apportionment formula gives the Upper Peninsula three legislative districts, which is approximately double what it would be entitled to under a straight population standard.[96] Yet, even a court which accepts one man-one vote as the golden rule of apportionment might find that the extra 1½ representatives are not too much to give for the sake of effective and convenient representation of the Upper Peninsula's residents. The Upper Peninsula not only covers an extremely large area[97] with most parts very sparsely populated, but also is isolated from the rest of the state by five miles of water which is spanned by a single bridge.[98] Under such circumstances the Court could well find that the 80-20 formula as applied in Michigan is as much justified as a county-boundary requirement, although both provisions obviously detract from equality of population among districts. It might be argued that Michigan should merely increase the size of its senate so that the Upper Peninsula would have three districts even on a strict population basis, but the size of its legislature should be within the area of choices which the state is free to make in its sound discretion.

* * * * *

The four approaches discussed here are not the only ones which the Court might adopt. They do, however, tend to bring out the various factors which must be considered in establishing a constitutional standard for judging legislative apportionment. Obviously, the difference in the consequences which flow from the use of one standard as opposed to another are very significant. Nevertheless, at least as important as the choice the Court makes is the manner in which it is made. It is hoped that the Court will face directly the various problems involved in establishing a standard — particularly that of determining the nature of representation in a representative government and its relation to the guarantee clause — rather than attempt, as some lower courts have done, to justify its conclusions by little more than a reference to the phrases "equal protection" or "invidious discrimination" as though these were talismanic terms which solve everything in their mere recital.

95 The Upper Peninsula accounts for 29% of Michigan's land mass, but contains only 3.9% of the state's population. SHULL, LEGISLATIVE APPORTIONMENT IN MICHIGAN 13, 26 (1961). In one instance, Keweenaw County, land area will account for 88.8% of the county's 1.08 apportionment factors. Thomas, *supra* note 12, at 31. (Keweenaw County is part of the Keweenaw Peninsula, located at the northernmost tip of the Upper Peninsula.) *Cf.* Lucas, *supra* note 76, at 768-69.

96 Although the state has not yet been apportioned under the new constitution, it is assumed that the Upper Peninsula will be divided into three legislative districts since it will be assigned approximately 45 apportionment factors. If the senate were apportioned on the basis of population, the Upper Peninsula's 3.9% of the state's population would entitle it to 1½ districts (the ideal district on such a basis containing 2.6% of the state's population).

97 Approximately 16,538 square miles. See SHULL, *op. cit. supra* note 95, at 13.

98 This "away from everything" location was underscored recently by the governor's decision to hold a separate inauguration in the Upper Peninsula. See Sincock v. Duffy, 215 F. Supp. 169, 187 (D. Del. 1963), referring to testimony concerning lack of accessibility in respect to the Upper Peninsula.

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